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THE FIRST BOOK IN ENGLISH ON THE LAW OF INCORPORATION.

The first English book on the Law of Corporations was published in London, 1659, and was written by William Sheppard, the author of the more famous book, "The Touchstone of Common Assurances."

Sheppard was a lawyer of large country practice, and the author of several other law books, well known in their day.

He was invited to London by Cromwell about 1653, and became a clerk of the upper bench. In 1656 he was made a sergeant-at-law, and one of the four clerks appointed to draw up charters granted by Cromwell to town corporations. In 1657 he petitioned Cromwell for an increase of salary, then £300 a year, representing that he had suffered a loss of income by giving up his country practice. He obtained an increase of £100 a year.

In 1659 he was appointed a puisne Justice of the County Palatine, but upon the Restoration the next year, he was deprived of the office and fell into obscurity.[1]

Allibone[2] tersely says: "He was a learned law writer, whose adherence to Cromwell precluded his books from the respectful recognition of his legal successors."

[1] Dictionary of National Biography, article on William Sheppard.

[2] Dict. of Eng. Lit., article "William Sheppard."

The titles of twenty-four of his works are given in the Dictionary of National Biography, and among them, No. 18, is the book in question: "Of Corporations, Fraternities and Guilds," there said to be in octavo, but the copy before me is only five and a half by three and three-quarter inches, although it has evidently been cut down a little, some time, in binding.

That it is the first English book on the subject appears from the author's own statement in the preface, addressed: "To my Dear Country-men," as follows:

"I thought therefore that nothing would be more acceptable to my country-men than a discourse in this kind of learning, the rather because no man's pen amongst us, has been employ'd on this subject before."

The next English book on Corporations was published anonymously in London in 1702. It is sometimes called the first book in English on this subject,[1] but in the preface the author says that Sheppard's is the only one previously written, and he plumes himself on having so much more to say:

> "I remember not any Treatise designedly written on this Subject except a little Duodecimo by Mr. Sheppard, which extends not to the fortieth part of the matters relating to Corporations."[2]

Sheppard's book is now very rare. It seems to have dropped out of sight during the last two centuries. Enquiry for it of the various great libraries in Boston, Cambridge, New York, Albany and Washington has failed to bring a copy to light.

Sheppard is better known as the author of "The Touchstone of Common Assurances," published in London in 1641. This work, with its quaint, happy title, is not included in the list of twenty-four books written by Sheppard, in the Dictionary of National Biography. In the preface to the fourth edition the editor, Edward Hilliard, says:

> "For a long time the Touchstone lay on the stalls of the second-hand booksellers in Moorfields, unnoticed and

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[1] 2 Harv. Law Rev. 110, note: "This is the first English book wholly devoted to the subject of Corporations."

[2] The Dict. of Nat. Biog. speaks of Sheppard's book as an octavo. Were there two editions?

of no repute. The late Lord Chief Justice Willes[1] was the person who rescued it from unmerited neglect, by the high character he gave it in the court where he presided. Tho' this treatise bears the name of Sheppard, yet doubts have arisen whether it be really his performance. * * * A note by a conveyancer, Booth, in a copy of the Touchstone reads: 'No part of this book is Sheppard's but the title; for it was originally wrote by Justice Doderige, whose library Sheppard purchased, where, among other books, he found the original manuscript of this treatise, and afterwards published it as his own. Sir Creswell Levinz had seen the manuscript in Justice Doderige's hands and from him Mr. Pigott, who was my author, had this information.' "

But this story, as well as the oblivion into which all of Sheppard's law books fell, may have resulted, as stated by Allibone, from the fact that he was an ardent Cromwellian. It may be that the manuscript seen in Justice Doderige's hands was Sheppard's own manuscript.

"In the first publication of this work Mr. Sheppard is accused of having assumed the laurels that belonged to another, for this excellent treatise is said to have been compiled by Joseph *Dodderidge;* yet notwithstanding this conjecture, it is to be observed that great part of the *Touchstone* is founded upon the authority of *Co. Lit.* which was first published in 1628 (4 Car. 1) the year that Judge Dodderidge died, and that in all the other works ascribed to him" (Dodderidge) "there does not occur a single reference to that work. It is further observable that in the *Touchstone,* pp. 67, 166, 266 and 239, references occur to Cases in 5 and 6 Car. 1, and also, in the edition of 1648, to Cases in 23 Car. 1."[2]

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[1] In Roe vs. Tranmer, 2 Wils. Rep. 75 at 78 in 1757—the Chief Justice said: "I rely much on Sheppard's Touchstone of Common Assurances, 82, 83 (which is a most excellent book) * * * " It is remarkable that this mild encomium should have rescued the book from oblivion after more than a century's neglect.

"The favorable opinion expressed of this work by Chief Justice Willes, led to five successive editions, and they experienced extensive and rapid sales." By Richard Preston in his "Address to the Reader" prefixed to the seventh edition of the "Touchstone" in 1820, p. IV., I cannot agree with this learned writer that Doddridge is "now confessedly its author." See below.

[2] A Short View of Legal Bibliography, 244—by Richard Whalley Bridgeman, London, 1807.

Sheppard also wrote "A Grand Abridgment of the Common and Statute Law of England."

> "Though not disreputable in its execution, it scarcely struggled into existence against the superior work of Lord Chief Justice Rolle."[1]

Surely the first English book on the law of Corporations, written by so eminent a writer, one who also had charge, as clerk, of the issuance of all municipal corporations, deserves examination and recognition. It is strange that this book should have been so forgotten. It seems to have been unknown to the writers on this branch of law, or it has been ignored by them, since the cursory reference to it in the preface to the anonymous book on corporations published in 1702. The title page, in the quaint style of that period, is as follows:

OF
CORPORATIONS,
Fraternities,
AND
GUILDS,
OR, a Discourse, wherein
THE LEARNING
of the LAW touching *Bodies-Politique* is unfolded, shewing the USE and NECESSITY of that *INVENTION*, the *ANTIQUITY, various Kinds, Order* and *Government* of the same.

Necessary to be known not only of all Members and Dependants of such Bodies; but of all the professors of our Common Law.
WITH
FORMS and PRESIDENTS,
OF
Charters of Corporation
By *William Shepheard, Sergeant at Law.*

London, Printed for *H. Twyford, T. Dring* and *J. Place;* and are to be sold at their Shops in *Vine-Court, Middle-Temple,* at the *George* in *Fleet-Street,* and at *Furnival's Inne-Gate* in Holborne, 1659.

[1] By Judge Story in a review of Dane's Digest in the North American Rev. no. 411., July, 1826, p. 6.

The list of Contents is as follows:

"Sect. I. What corporation is, and the kinds thereof.
Sect. II. Who may make it, and how it is made.
Sect. III. What persons may be Incorporated.
Sect. IV. By what name such persons may be Incorporated.
Sect. V. In what place a Corporation may be made.
Sect. VI. By what words a Corporation may be made.
Sect. VII. The Charter for Corporations divided in two parts and opened.
Sect. VIII. What Ordinances a Corporation may make.
Sect. IX. The nature of a Corporation. And what it may have, hold and do. And how."

This part of the book consists of 129 pages. It is followed by

THE
FORMES
AND
PRESIDENTS
OF
CHARTERS;
Concerning
CORPORATIONS
WITH
The Chief Matters that
are usually contained in
them.

LONDON
Printed by J. Streater, for Thomas Dring
and H. Twyford, MDCLIX.

The paging is continuous and ends with page 187. The book treats of municipal corporations principally, but it treats indifferently, as the title states, of corporations, fraternities and guilds, thus plainly indicating that even so late as 1659 the distinctions between them were imperfectly realized.

On page 2 he gives the artificial classification of corporations that still unfortunately obtains,[1] (sole and aggregate, ecclesiastical and lay, eleemosynary and civil, etc.).

At page 3 Sheppard says:

"So also the Parishioners or Neighbours in a Parish, Village, or Town, and the Church-wardens of every Parish:" (for) "some purposes are in the eye of the Law corporations, aggregate of many persons," failing to distinguish between true corporations and bodies that have fallen out of the ranks in the march that has resulted in incorporation—or perhaps it would be more accurate to say that even in Sheppard's day, towns were not to be considered corporations, any more than were parishes, villages, or the church-wardens of every parish. Unfortunately this confusion and uncertainty still exist in the text books and authorities and is due to want of knowledge of the origin of municipal corporations. Thus, in Beardsley vs. Smith, 16 Conn. 368, the land of the town treated as an independent political unit, Church, J., in the opinion, at p. 376, speaks of towns and cities as "municipal or *quasi* corporations." On the other hand, the recognition of towns as corporations in themselves, not dependent upon any external authority as their source, is admitted by Shaw, C. J., in Overseers of the Poor of Boston vs. Sears, 22 Pick. 122 at 130:

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[1]The artificial character of this classification is well pointed out in 2 Harv. Law Rev. 105.

"The most striking peculiarity found on first examination of business corporations is the fact that different kinds of corporations are treated without distinction as if the same rules were applicable to all alike. Subdivisions into special kinds are indeed made, but the classification is based upon differences of fact rather than on differences in legal treatment. Thus corporations are divided into sole and aggregate. Again they are divided into ecclesiastical and lay, and lay corporations are again divided into eleemosynary and civil. But the division having been made, the older authorities, (e. g. Coke, in Sutton's Hospital Case, 10 Rep. 1; The Law of Corporations. 1 Blacks. Com. ch. xviii; Kyd on Corporations) proceed to treat them all together, now and then recording some minor peculiarity of a corporation sole or of an ecclesiastical corporation with one member capable."

The result has been the obscuring of the true differences between the really different kinds of corporations and a failure to adopt some system of classification based upon those real differences.

"Towns were of themselves corporations having perpetual succession, consisting of all persons inhabiting within certain territorial lines."[1]

Sheppard's definition of "corporation" is broad enough to include all corporations and all kinds of corporations, without reference to their origin. Page 1, he says: "A Corporation or an Incorporation (which is all one)[2] is a body in fiction of Law, or a body Politick that endureth in perpetual succession."

This is broad enough to include the numerous corporations in England that are commonly said to be corporations by prescription, although many of them have numerous charters,[3] some of which even antedate the time of legal memory, 1189.[4]

It is even broad enough to include the self-created corporations already then to be found in the American Colonies.[5] In New

[1] "The manor and the township are the children of the village community. Under the feudal system, the former, in England, has taken on, or has had conferred upon it, the essential parts of the older organization and has left the latter almost devoid of vitality. But when the English settlers brought over to New England, and there established their system of town government, without also establishing manors and lords of manors, they deprived their system of that element that had contributed to its decay in England. I am therefore inclined to attribute the success of town government in New England to its perfect democracy—its omission of the aristocratic element under which, in England the lord of the manor had absorbed the essential parts of the older organization, the village community."

(The Literature of Local Institutions, Gomme; 1886, p. 171.) See also Johns Hopkins Univ. Studies, Ed. by Adams, Series I—II—III—IV—VII, etc.,—for studies of the beginnings of government, especially of local self-government, in the American Colonies. American lawyers and courts too often fail to apply the teachings therefrom to be derived, because they cannot find them in the reported cases.

[2] *Incorporation*, the process or means whereby a corporation is formed, and its final state, as distinguished from *Corporation*, the artificial legal entity thus formed,was evidently a distinction unknown to our author. His title page speaks of "Forms and Presidents of Charters of Corporations" where we should speak of "Charters of Incorporation."

[3] Touro with 8 charters (Rep. of 1835 on the Mun. Corps. of Eng. & Wales, 655. Plympton Earle with 10 charters (do. 599).

[4] Beverly, with charters from the Archbishop of York, confirmed by Hen. I (1100 to 1135) and Hen. II (1154-1189). Merewether & Stephens, 391.

[5] i. e., Plymouth, settled in 1620; Salem, in 1625; Hartford, Windsor and Wethersfield, in 1636; Providence, in 1636; Portsmouth, R. I. in 1637; Newport, R. I., in 1638; Exeter, N. H.. in 1639; Dover, N. H., Hampstead, N. H. and many others.

England these self-constituted towns were the units of the political system then taking shape. They were recognized by common consent and finally by the colonial general assemblies or legislatures.[1] The legislatures did not create these towns; they created themselves and were afterwards acknowledged by the legislature.[2] Yet so eminent an authority as Maitland[3] says:

> "Ignorant men on board the 'Mayflower' may have thought that in the presence of God and of one another, they could covenant and combine themselves together into a 'civil body politic.' Their descendants know better. A classical definition has taught that "a corporation is a franchise;" and a franchise is a part of the State's power in the hands of a subject (Kent, Commentaries, Lect. 33); 'A Corporation is a franchise possessed by one or more individuals, who subsist as a body politic under a special denomination, and are vested by the law with the capacity of perpetual succession, and of acting in several respects as a single individual.[4] In its most extensive sense it' (franchise) 'expresses every political right which can be enjoyed or exercised by a freeman: in this sense, the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; and in this sense, the right of acting as a corporation may be called a franchise, existing collectively in all the individuals of whom the corporation is composed; in this sense, and in this sense alone, 'the franchise of *being* a corporation,' can have any precise meaning.' "

These words seem to have been written as if in reply to Kent:—

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[1] Overseers of the Poor of Boston vs. Sears, 23 Pick. 122 (1839). See the instructive opinion by Shaw, C. J.

[2] The two self-created towns in Rhode Island on the island of Aquidneck, without any authority except of their own action, with no patent from England, and with no title to the soil except what they bought of the Indians, at a "General Court of Elections" held at Portsmouth in 1641, united and formed themselves into a state, using that very term and adopting a state seal (1 R. I. Col. Recs. 112—1150). When Channing (United States of America, 1897, p. 37) said, "Strong as was town organization, it was not older than the central governments, and it cannot be said that the State was founded on the towns," he could not have had these facts in mind.

[3] Political Theories of the Middle Ages, Otto Gierke, translated by Fr. W. Maitland, in his introduction, xxxi.

[4] But see 1 Kyd on Corps. 14.

"To be a subject born, and to have Liberty and Privilege of a Freeman, and no Villain, is a great Franchise; and therefore in Law, when a Villain is made free, we say he is Infranchised, he hath the Franchise, Liberty and Priviledge of being a Freeman." —By Pollexfen in the case of the Quo Warranto against the City of London, London, 1696, p. 97.

Classic though it be, the definition is not broad enough to include all corporations, *i. e.,* lands with certain bounds may be incorporated and there may not be an individual within those bounds. There are therefore no "individuals possessing franchises" in such a corporation. After the suppression of the monasteries by Henry VIII, there were no "individuals possessing franchises" yet the corporations were still in existence, although it was assumed they were defunct.

Such strict adherence to a formal definition is also in conflict with what the same learned writer, Maitland, says further, in the same Introduction at p. 34, speaking of Anglo-Saxon or Teutonic local self-government:

> "And do you not think that some part at least of the appalling mess—forgive us—the appalling mess that you made of your local self-government, was due to a bad foreign theory which, coupling corporateness with princely privilege, refused to recognize and foster into vigor the bodileness that was immanent in every English township, in every rural Gemeinde? * * * that fatal blunder—from which some of your less pedantic kinsmen in the colonies kept themselves free when they suffered 'the New England town' to develop its inherent corporateness."
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> (Page 38): "What is more, many foreign lawyers are coming to the conclusion that in these days of free association, if a group behave as a corporation, the courts are well nigh compelled to treat it as such, at least in the retrospect. It is strongly urged that in such cases injustice will be done unless corporateness is treated as matter of fact, and American courts have made large strides in this direction."

Now, as if in fulfillment of these prophetic words, comes the decision in the House of Lords that a registered, voluntary association may be sued as a body corporate.[1]

[1] Taff Vale Railway vs. Amalgamated Soc. of Railroad Servants, L. T. R. July 22, 1901, p. 698.

In the Dartmouth College cases,[1] Marshall, C. J., gives, in terse form, the often quoted definition of a corporation, as:

> "An artificial being, invisible, intangible and existing only in contemplation of law."

But this is not broad enough to include the many municipal corporations that long existed, both in England and in the American colonies, before they received legal recognition. Our division of corporations into those *de jure* and those *de facto* is a recognition of this, and a complete definition of "Corporation" must be broad enough to include all corporations, as, for instance, "an imaginary or fictitious perdurable entity, finally recognized by the law." If we attempt a more precise definition we find that our precision will exclude some recognized kind of a corporation.

For further definitions, none of which are, however, satisfactory, see 1 Kyd on Corps., 13; Angell & Ames on Corps., secs. 1-2; Dillon on Mun. Corps., secs. 18-19-20, 4th ed.; Morawetz on Priv. Corps., secs. 1 to 7, and others.

The curious scholastic reasoning in 2 Bulstrode 233 (1614)[2] is responsible for the misleading metaphysical doctrine that corporations have no souls, from which was drawn the conclusion that a corporation cannot commit a trespass, cannot be guilty of treason, etc. But why was it not held equally logical to conclude that a corporation cannot promise and therefore cannot enter into a contract?

It would be equally correct (and equally childish) to reason that none can create bodies but God, but the King creates corporations, therefore they have no bodies. Therefore a corporation has no soul nor body. Having no soul nor mind, it can do nothing requiring the exercise of mental powers; having no body it can have no members and can do nothing requiring the exercise of physical powers. It has no arms, no hands, etc. It cannot sign a deed nor affix the corporate seal; nor can it express its intention to have these things done for it. It cannot do anything.

On a par with this reasoning is that of Sir George Treby and Mr. Pollexfen (both afterwards judges) in Quo Warranto against the City of London, that as a corporation is an invisible body, it cannot be sued.[3] Such are some of the absurd results of the

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[1] 4 Wheaton, 518 at 636.

[2] "None can create souls but God, but the King creates them" (corporations) "and therefore they have no souls."

[3] Merewether & Stephens, 1802.

following out to their logical conclusions the scholastic reasoning of past ages.[1]

The truth is that corporations act both as to mental and physical concerns, through agents thereunto appointed by charter or otherwise. It follows that a corporation should be held liable for its acts, mental or physical, material or immaterial, done by its agents, acting within the scope of their authority, or if the corporation authorized, directed, assented to or ratified such acts.

If any force is to be given to such reasoning as that in Bulstrode, repeated by Coke in the case of Sutton's Hospital,[2] instead of coming to the conclusion that a corporation has no soul, it would be more correct to conclude that a corporation is nothing but a soul, it being an immaterial entity, a *persona ficta.* Certainly it has no body—an immaterial body is an absurdity beyond our comprehension.

"The core of the matter seems to be that for more or less numerous purposes, some organized group of men is treated as a unit which has rights and duties other than the rights and duties of all or any of its members."[3]

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[1] "We now begin to hear a dogma (of which all English lawyers know a vulgar version) that the universitas can be punished neither in this world nor in the next, for that it has no soul nor body" (Pollock & Maitland, 1 Hist. Eng. Law, 477.) Not until 1842 was it finally settled in England that a corporation can commit a trespass. (Maund vs. Mon. Canal Co., 4 M. & G. 452)."

But see 1 Kyd on Corps., 223.

Grant on Corps., 278, commenting on Maund vs. Mon. Canal Co., cites several cases from the Year Books holding corporations liable for trespass—of course these decisions are inconsistent with the reasoning of their time, but as Grant well says; it being established that case would lie against a corporation, it is remarkable that any doubt should ever have been felt as to trespass.

A corporation is but a name. Y. B. 21 Ed. IV. F. 13—pl. 4.

A corporation is but a person. Y. B. 32 H. VI. F. 9—pl. 13.

Combining the two, P. & M. say; (1 Hist. Eng. Law, 474) "It is at once a person and yet but a name; in short it is a persona ficta."

[2] 10 Rep. 253.

[3] P. & M., Hist. Eng. Law, 488. It does not require a group of men, however, to constitute a corporation. As before stated, p. 267, land within certain stated bounds may be made a corporation, and there may not be an inhabitant within those bounds. There may even be a corporation without land or members. i. e., if an earthquake should swallow all the land of an incorporated town or city with all its inhabitants, the corporation would still continue. But Angell & Ames on Corps., sec. 768, p. 800, 10th ed. (1875), still maintain that a corporation is dissolved by the death of all its members, citing several authorities and decisions in support of the proposition. Surely this is inconsistent with the modern idea of a corporation as a *persona ficta* that exists independently of the existence of its members. And here again we run across the difficulty of attempting to adopt a rule applicable to all kinds of corporations alike, for this mode of dissolution cannot apply to pecuniary or business corporations. "The shares, being property, pass by assignment, bequest or descent, and must ever remain the property of some persons, who, of necessity, must be members of the corporation as long as it may exist."—(By Morton, J., in Boston Glass Manufactory v. Langdon, 24 Pick. 49 at 52.

This was adumbrated in the cases of the men of Dale[1] and of the men of Islington.[2]

It must be ever borne in mind that "from the time of the *Norman* Conquest and downwards, the Cities and Towns of *England* were vested either in the Crown or else in the Clergy, or in the Barónage or great men of the Layety. That is to say, the King was immediate Lord of some Towns, and Particular Persons either of the Clergy or Layety were immediate Lords of other Towns."[3]

In the first case we read: "Nota, que fut tenue en le Common Bank que si le Roy done en fee ferme *probis hominibus villae de Dale,* que le corporation est bon." In the second case: "It was holden for law in the Star Chamber by Bromeley, Chief Justice, Sir John Baker and others, that if the queen at this day would grant land by her charter *to the good men of Islington,* without saying *to have to them, their heirs and successors,* rendering a rent, this is a good corporation forever to this intent alone, and not to any other, etc. But then it seems they are only tenants at will: and if the queen release or grant to them the said rent and fee-farm, it should seem the corporation is dissolved *ipso facto,* for the rent and farm was the cause which enabled the corporation, etc. Ideo quaere."[4]

Charters of the same nature as these had long been granted by lords of manors, both lay and ecclesiastic, and by Kings holding manors as of their own demesne.[5]

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[1] Y. B. 7 Ed. IV, Tr. Term 7 (1468). Shep. on Corps. 32.

[2] Dyer, 100 (1553). Shep. on Corps. 36. Notice the dates. The latter case, 85 years later in point of time, reiterates the principle of the first one. Had no more definite conception of incorporation arisen in all these years? Notice too that in both cases there is no mention of either 'heirs' or 'successors' of the grantees. If there was incorporation without either word, why the long dispute afterwards, and contention that there can be no incorporation without the magical word 'successors'?

[3] Madox, Firma Burgi, 4.

[4] This shows how essential to the idea of municipal incorporation fee-farm rent was deemed.

[5] See the many cases cited in "The Origin of Municipal Incorporation in England and in the United States," by Amasa M. Eaton in the Annual Proceedings of the Am. Bar Assn. 1902—i. e., to Newport in Pembrokeshire in 1192 by Nichols, son of the lord of the barony of Kames (Rep. on Mun. Corps. of 1835—Touro, do. 655); to Kilkenny in Ireland by the Earl of Pembroke in 1189 (M. & S. 359); to Durham, between 1189 and 1199 by Hugh Pudsie, Bishop of Durham (M. & S. 365); to Whitby by the abbot, confirmed by King John (M. & S. 388); to Clithroe by the Earl of Lincoln, confirmed in 1229 by Ed. I. (M. & S. 545); to Newport by the Earl of Devon, between 1154 and 1189 confirmed by the Countess of Devon, between 1327 and 1377, confirmed 26 Ed. III. (M. & S. 771); to Tenby by William de Valencia and the Countess Johanna his wife, by Aldomar de Valencia, confirmed by Lawrence de Hastings, confirmed by Ed. III. and Rich. II. The borough was formally incorporated by Eliz. in 1581 (M. & S. 817 and 818); to Plympton Earle by the Earl of Devon in 1241, the Countess of Devon, *incer. temp.*, 13 Ed. III. (1339) and seven later charters (Rep. on Mun. Corps. 596) etc., etc.

If charters of this description issued by the King in the exercise of his royal prerogative, were finally deemed by the courts to have incorporated the grantees, then the same kinds of charters issued by lords of manors must equally be deemed to have incorporated the grantees, and no one has ever doubted the validity of such incorporation by lords of manors.

Charters of this kind issued by lords of manors, were afterwards confirmed by the King[1] and charters of the same kind issued by the King were occasionally confirmed by the lord of the manor.[2]

When James II, in dire straits for money, without again summoning Parliament, resorted to Quo Warranto against the Municipal Corporations of the realm, in order to compound for a partial restoration of their rights upon payment of a higher fee-farm rent or a large sum by way of fine, it never occurred to any of the favoring sycophants and servile lawyers and judges about him, that these municipalities were not true corporations and hence were liable to forfeiture, under decree in Quo Warranto.

Sheppard's test of corporateness, irrespective of its origin, is a broad one. After defining "corporation," he says (page 3):

> "Or, it is of many persons together. So Majors" (Mayors) "and Commonalities, and all such kind of corporations: Masters and Fellows of Colleges: and some Guardians and Masters of Hospitals: and divers others, where the succession is in many persons, are said to be a body politick, so also the Parishioners or Neighbors in a Parish or Village or Town and the Church wardens of every Parish" (for) "some purposes are in the eye of the Law, Corporations aggregate of many persons."[3]

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[1] i. e., See the instances above cited, with many others in "The Origin of Municipal Incorporation," etc., above cited.

[2] i. e., In 1527 Arthur Plantagenet, Viscount Leslie, vice-admiral of England, reciting former grants, including one from William de Montacute, confirmed by Hen. VIII., gave a charter to Poole, ratifying and confirming all former grants (M. & S. 1125).

[3] Various enquiries and remarks suggest themselves here: how can many of these be considered corporations in the eye of the law unless the law ignores its own doctrine that only the King can incorporate? Can it be that so late as 1659 when Sheppard wrote, the law considered all these incongruous concerns as corporations? In the march towards incorporation, most of them have since dropped by the wayside. The wonder is that even then, some of them were considered as being in the procession.

At page 4 our author continues:

> "And so we say: A corporation is a body politick, Authorized by the Lord Protector's Charter, to have a Common Seal, Head Officer and Members; all of which together are able by the Common consent, to grant, give, receive or take anything within the Compass of their Charter or to sue and be sued, as any one man may do, or be. Or they are said to be an Assembly or Commonalty of many men gathered or joyned together in a City, Town or Borough into one Fellowship, Brotherhood or Mind, by mutual consent, to support the Common Charge each of other, and to live under such laws as they shall agree upon to make, to be governed for their mutual good and advantage in a perpetual succession."

But surely he cannot mean that there is no good incorporation except by the Lord Protector's Charter (or the King's) for no one pretends that some of the bodies mentioned above, as cited from page 3 of his book, have charters of corporation from any one. And if an assembly of those gathered or joined together in a town or borough into one fellowship constitute a corporation, it is to be noted that this is not so broad as the definition on page 3, as it excludes parishioners or neighbors in a parish or village and the church-wardens of every parish, by including only those who join together in a town or borough.

Following Coke, in his many inaccuracies in the case of Sutton's Hospital, 10 Rep. 1, our author, pages 6, 7 and 8, says that a corporation may be made in four ways:

> "1. By the Common Law; so the King was and Lord Protector is, and many others are Bodies Politick.
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> 2. By authority of Parliament; so the College of Physicians in 14 H. 8. Chap. 5, was made a Corporation: And so Sutton's Hospital was intended to be made.
>
> "3. By prescription. That which hath been and continued time out of mind, a good Corporation: and hath all the incidents and Badges of a good Corporation, shall continue so, albeit they cannot show any charter for it. For this doubtlesse was by Charter first, the which hath been since lost.
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> "4. By Charter or Letters Patent of the King: And so, most of the Corporations have been made. And so they may and must be made at this day, or by act of

> Parliament: And so by Charter; the Lord Protector may make what Corporations he pleaseth; and without this none can be Erected at this day."

With the sanction of the great name of Coke these statements have been repeated ever since and now are accepted everywhere. Nevertheless doubts may be expressed on two points.

The doctrine of charters "lost by time and accident" is a pure fiction of the law, a notion of comparatively late date, the effect of which has been to conceal the ignorance and indolence of those promulgating it. It is not in accord with well-known facts.

When John de Waltham, Master of the Rolls temp. Rich. II (1377 to 1399), left office, he delivered all the records in his possession to his successor, by an indenture minutely specifying every document. When Merewether & Stephens[1] wrote, in 1835, they found every document there mentioned was still in existence. Considering this fact, as well as the minute particularity with which every former charter is specified and recited in the very same words in Inspeximus Charters succeeding them, it is in defiance of probability and fair presumption to assume that any charters have been lost or that any ever were in existence not now to be traced, either by original or Inspeximus. There exist now in England municipal corporations that are called and call themselves corporations by prescription, although they have a string of charters in their archives.[2]

The second point of difference from Sheppard above reserved, is his statement that no incorporation is good without the King's charter. He relies upon the well-known case of Sutton's Hospital and Coke's report of that case.[3]

The reasons for doubting the authority of this case are stated in the paper read before the American Bar Association in 1902, upon the Origin of Municipal Incorporation, to which the reader is referred. In brief, we find that in that case no distinction was made between different kinds of corporations and that what may be true of a private or quasi-private corporation like Sutton's Hospital is not necessarily true of municipal corporations; that Coke was one of the Governors and should not have sat in the case; that he may have been influenced by his feeling against Bacon, who was of counsel for the contestant; that his logic is bad and that

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[1] p. 774.

[2] See cases cited in "The Origin of Municipal Corporations." *ut supra*.

[3] 10 Co. 1a.

his opinion and treatment of the case were not judicial. It is enough to quote his own words: "Which brief report I have made of these objections because I think them or the greater part of them, were not worthy to be moved at the bar, nor remembered at the bench; and that this case was adjourned to the Exchequer-chamber by the Justices of the King's Bench, more for the weight of the value, than for the difficulty of the law in the case." "And all the arguments which have been made against this honourable work of charity are hatched out of mere conceit and new invention without any ground of law, and such which have any colour were utterly mistaken."

Sec. III of Sheppard's book treats of the persons to be incorporated. He says, p. 10: There must be persons to be incorporated; but we know this is not so—*i. e.*—land within certain limits may be incorporated, or a corporation may be constituted by joining corporations into one corporation. Indeed, when Sheppard says: "Or the whole City, Town, Borrough or Village may be incorporated," does he not concede that a corporation may be formed without persons? I am inclined to think he does not, and that what he means is that all persons in a city, town, borough or village may be incorporated, for he proceeds: "Or a part of the City, as the Burgesses of the Burrough, or the Freemen of the City onely, may be Incorporated," plainly meaning that the members of a particular class only may be constituted the corporation. The conception that the city, town, borough or village of A should be a corporation (without members), was evidently unknown to our writer,[1] for he says further: "3 Trades-men of the City, or the men of such a trade only, in the Town may be Incorporated." Hence the incorporation of guilds and finally of trading and other business companies, now called private corporations. This is, however, an unscientific classification or designation, as all incorporation is of public concern, and to call them private corporations is but to conceal the power of the State over them. I cannot, therefore, agree with the statement.

"The necessity for persons to compose the corporation, results from the nature of things rather than from any rule of law. Perhaps the same may be said of the importance of a name."[2]

"In the case of the Dutch West India Company v. Van Moses, 1 Stra. 612, decided in 1724, it was held that the action was well brought though no certain name had been given to the Company by

[1] Evidently Sheppard had no adequate conception of a corporation as a "persona ficta."

[2] Williston, Law of Business Corps. 2 Harv. Law Rev. 114. I cannot, however, admit there is such a necessity.

the Dutch States, the name being that by which it was actually called."

This case is of course since Sheppard's day—but see the case of Queen's College, Oxford, Dr. Ayray's case, 11 Co. 18 b, 11 Jas. I. (1624), that had no name given it at its foundation, "but having received their foundation and several other benefactions from the Queen, they collected by reputation, the name of Queen's College, by which name they sue and are sued." 1 Stra. 612, in the argument for the Dutch West India Co. by Pengelly, Sergeant.

Sheppard proceeds, p. 11:

> "4. The Head Officers, and Governours only, chosen and to be chosen from time to time in the place, may be Incorporate.
>
> "5. In the case of Colleges, the persons incorporated may be either the Governours alone, as Masters and Fellows, and the like; or the Governours and Governed together; as Masters, Fellows and Schollers of the Colledge.
>
> "6. In case of Hospitals and Alms-houses, the persons Incorporated may be the Governour or Governours, as Masters or Guardians; or them, and the rest of the officers, and poor, as the Founder shall desire, and the Lord Protector grant it."

But plainly the statutes 39 Eliz. ch. 5 & 21 Jas. I ch. 1, the first general incorporation act, gave a power to incorporate without action by King or Parliament. Evidently so late as 1659, although the act had been in force 62 years, its effect was not realized by our writer. His statement on p. 12 also shows this, *i. e.*:

"The persons Incorporated in Sutton's Hospital were the Governors thereof only." We should say now that the hospital was incorporated and a power was given to the founder and his successors to appoint the Governors.

Section IV is entitled: "By what names such persons may be incorporated."

By this Sheppard does not mean what name shall be used as the name of the corporation, but whether the title shall be that of the Mayor and Commonalty of ——— or that of the Mayor, Bailiffs and Commonalty: or that of the Mayor, Aldermen and Commonalty: or that of the Mayor, Aldermen and Common Council: or that of the Mayor, Citizens and Commonalty, etc. This seems puerile to us, who incorporate the town or city of A, and then provide what officers it shall have, their duties, terms of office, how elected, etc. But of old the question was important because the terms used limited

the class in which the civic power dwelt. By the exclusion of all except those included within the letter of the terms used, and by their having the exclusive power to elect their own successors, the power to vote was taken away from or denied to the great body of the burgesses or householders, and there resulted the evils of close incorporation that contributed largely towards bringing local self-government in the towns and boroughs of England into such a low state at the time of the passage of the Reform Act in 1832. This decay was further assisted by the doctrine adopted that the select members thus held to constitute the corporation need not be residents. Frequently, through insidious and unchecked abuse of power, a town corporation became a close one, in spite of the express terms of the charter.

> "Albeit it be expressed in the charter, that the Choyce of their Mayor, Bailiffs or other principal Officers, shall be by the Commonalty, yet, if by a long usage they have chosen them by a select number of the principal of the Commonalty, or of the Burgesses, although no such constitution can be shewed to warrant such Election, yet this Election is good Law, being intended and presumed to begin by common consent. Coo. 4, 77."[1]

This shows that even so late as 1659 municipal charters were still considered as of little importance. It also shows an utter disregard of the rule that parole testimony shall not be allowed to vary the terms of a written document.

We have escaped the dangers of close incorporation in this country through our acceptance of Democracy.

Next, pages 15, 16, 17, Sheppard treats of companies that may be incorporated ("The Master or Governors and Commonalty of

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[1] Sheppard on Corporations, 58. The case of Corporations, 4 Co. 77a here referred to, is extrajudicial, however, the opinion being what we call an advisory opinion only "Which question being of great importance and consequence, was referred by the Lords of the Council to the Justices, to know the law in this case" (loc. cit.) "As for the objection made from the resolution of the Judges in the year 1583, I give these answers to it, that it was an extrajudicial opinion; and though I must give reverence to the opinion of the judges, yet I make a difference between cases adjudged upon debate and having counsel on both sides, and resolution upon a case reported or referred to them." By Sir Orlando Bridgman in Beckman vs. Maplesden, O. Bridgman Rep. 60 at 78 (1662). This is the earliest case known to me pointing out the difference between an advisory opinion and a judicial decision. On this subject see further "The Duty of Judges as Const. Advisers," H. A. Dubuque, 24 Am. Law. Rev. 369; "On the Origin and Scope of the Am. Doctrines of Const. Law," 7 Harv. Law Rev. 153, Prof. Thayer, and "Constitution Making in Rhode Island," 26—Amasa M. Eaton.

the Mystery of *Cooks* of *London*: The Masters and Wardens of the Company of *Pewterers* in the City of *London*: The Company of *Merchant Taylors* in London," etc.), the precursors of our business corporations, which, fortunately for the stockholders, have not become close corporations.

Then "The Colledges and Halls of Universities, and other like places are, and may be, Incorporate by the names of Warden and Fellows of, etc., in the County of, etc. Or, Provost, and Fellow; or, Provost, Fellows and Schollers, or President and Fellows, or President and Schollers; or Master and Fellows, or Principall and Fellows; or Warden, Fellows and Schollers; or Warden or Schollers; or Masters, Fellows and Schollers; or Master and Schollers, or Keepers of the Colledge, and the Schollers of the same Colledge; or any other such like Names."

This is given in full, to show that in spite of Sheppard's minute particularity, it never occurred to him that a college might be incorporated simply as A college, or the University of B, etc. These and other sections also show that Sheppard failed, as indeed did writers on corporations after him, fail for more than a century, to distinguish between different kinds of corporations and to see that rules of law applicable to one kind of corporations were inapplicable to other kinds, and that while it might be true that only the King can grant charters of some kinds, it was not true that only he could grant charters of another kind. *i. e.* charters of municipal corporation.

The charters included in this section have not escaped close incorporation. We may note in passing, the efforts now being made to enlarge the electorate, so as to include, at least the graduate members of certain universities. Then will come the question of a further enlargement, so as to include, at least for certain purposes, their undergraduate members.

Sec. V, p. 18, "In what place a Corporation may be made," Sheppard says:

"The place there must be a place certain, where to fix and bottome the corporation," giving examples. Yet he admits, p. 19, there are corporations allowed to be good that were not so fixed, as The Hospital of St. Lazer of Jerusalem in England, etc., citing 10 Coke, 32, 33, spelling it Coo, as he always does, thus pointing out its pronunciation in his day as Cook, the pronunciation still retained in England.

> "This requirement, apparently so fanciful, is explained by the fact that the early corporations were almost all

> formed for local or special government of some kind, and it was consequently necessary to designate the place where the jurisdiction was to be exercised. The requisite must very early have become merely formal in case of certain classes of corporations, and might be fictitious."[1]

Sect. VI, p. 21, treats of the words by which a corporation may be constituted.

> "If it be constituted and mâde by Charter, there must be apt words therein for the making thereof, which are the words commonly used in Charters for this purpose. For a Town or Village. That the same Town or Village, and all the inhabitants thereof be in Deed and Law one body and perpetual Cominalty or Corporation, and Incorporated by the name of, etc. Or thus: That the said town of B. be and remain forever, a free Town of itself—."

This is undoubtedly good law, but it is in conflict with what he has already said in Sec. IV. There is thus produced a state of confusion that opened the door to the evils of close incorporation that might have been escaped by adherence to the principle last above enunciated.

No set of words are necessary to municipal incorporation, at least, and this is in conformity with its origin. The question really is, what was the intention of the parties, of the burgesses or householders on the one part, and the lord of the manor and afterwards the King, on the other part. When these charters were first granted there was undoubtedly no intention to create a corporation, as neither party knew what a corporation was, nor that there was such a thing as a corporation. But out of the relationship entered into, municipal incorporation finally resulted by a process of development, ignored at the present day and in great measure by the writers of the past.

In another connection Sheppard has already stated, p. 13, that corporations need not any certain words: "for they may be made by almost any intelligible words, importing the matter intended."

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[1] Williston, Law of Business Corps. 2 Harv. Law Rev. 115. It furnishes us also with an illustration of the confusion brought about by the failure to distinguish between different kinds of corporations, and the consequent misapplication of rules, valid as to one kind of corporation, as valid to all kinds. Prof. Williston well points out, also, that as the purposes for which corporations were instituted became more varied, and the mode of thought of lawyers became more reasonable, less stress was laid on this formality. Already in "The Law of Corporations" published in 1702, it is hardly mentioned, Blackstone, (Com. Bk. 1, ch. xviii) only refers to it, and Kyd (1st vol. 228) says, "It is generally denominated of some place."

At p. 23, following Coke in the case of Sutton's Hospital, he says: "And there is no necessity that there should be the words *Fundo, Erigo* or *Stabilio,* used for the Erection of the Corporation in any case; but it may be done by other apt words also." Summing up p. 37, Sheppard says: "1. That an Incorporation may be made with few words and that there is no certain form of words for it."

It is the intention of the parties and not any set form of words that creates incorporation. Therefore the voluntary agreements of the first settlers in New England, without other than their self-asserted authority, to associate themselves together as bodies politic and corporate did constitute them corporations. The hesitation to credit them with this capacity is due to long continued prevalence of the erroneous doctrine that only the King can incorporate.

It is also due, in part, to the continued prevalence of the incorrect doctrine (assumed, if not always expressly stated) that the grant of a charter of incorporation is the exercise of a sovereign power. The facts of history do not support this view. On the contrary, it is a fact that many towns exist in England that have always been admitted to be valid corporations, although they held only charters from the lord of the manor. It is also the fact that the self-incorporated towns of New England were admitted to be corporations by legislatures and by courts. Of old, then, incorporation was not the exercise of a sovereign power, whatever incorrect view may now prevail. The importance of this question is apparent, for if my views are correct, Congress may grant charters of incorporation of all kinds, regardless of the fact that the Constitution does not give it such power.

The timidity of Congress in exercising this power is remarkable. It has incorporated but few private or business corporations, *i. e.* Columbian College, Steam Packet Company, National Institute, National Hotel Company, Hiram O. Alden and James Eddy, their associates and assigns, to construct a telegraph line from the Mississippi River to the Pacific Ocean (here is a national corporation without a name!), Grand Lodge of Independent Order of Odd Fellows, Union Pacific Railroad Company, National Academy of Sciences, the American Historical Association, etc. The list of 48 of these corporations, all there then were, may be found in Senate Report No. 803, 53d Congress, 3d Session, Jan. 22, 1895. Most of these charters timidly state that the corporation is created in the District of Columbia, and contain a provision that the corporation shall have an office in the District, seemingly to make it appear that

Congress is only exercising its power to create a corporation in the District, which it has undoubted power to do. In the opinion of the writer, whenever it is proposed to create a corporation that from its nature is national in its scope and objects, such as the Union Pacific Railroad Company, among the above, or the American Irrigation Company, the Mississippi River Improvement Company, the American Educational Union, the American Historical Association, the Colonial Dames (refused by Congress, but largely because the members of rival societies fought each other so bitterly), the Order of the Cincinnati, etc., etc., Congress has power to grant a charter of incorporation, and is under no legal obligation to provide that any such a corporation shall have an office in the District of Columbia. On the contrary, if such be the wish of the incorporators and the will of Congress, such charters may provide for an office in every State of the Union, or in one State only.

Plainly, no charter by any one State or by more than one, that is, by several States, can create a national corporation—such as a national bank.

Sheppard then treats of the charters of Sutton's Hospital, p. 24; the Hospital of Edward VI. in Mondon, p. 26; the Colledge of Physicians, p. 27; the Chauntry-house in London, p. 28; Sacum, in Wilts, p. 29; Queen's Colledge in Oxford, p. 30; the Savoy, p. 32; the Worsted Weavers of Norwich, p. 33; the Society for the Propagation of the Gospel in New England, p. 35, and the charter to the honest men of the village of Islington, p. 36. Their mere mention emphasizes his failure to distinguish between the different kinds of corporations, a failure that has left mischievous consequences even now. On p. 31 he gives a summary of the Stat. 39 Eliz. ch. 5, revised and made perpetual by Stat. 21 Jas. I, ch. 1—the first of our general incorporation acts.

In concluding this section he says:

> "1. That an incorporation may be made with few words and that there is no certain form of words for it. That it may be made absolute and perfect at the first, or with Reference to somewhat after to be done to perfect it. This one is of the Substance, and must be expressed, or strongly implyed by the words, That the Lo. Protector doth give leave to make such a Corporation.[1] That in

[1] How was it possible to maintain such a doctrine in 1659 with the acts of 39 Eliz. ch. 5 and 21 Jas. I. ch. 1—in force?

such a place certain, such a house shall be built for such a use, and such a Government and Governours shall be of and in it. And those persons shall be a corporation to continue for ever by such a name.

"2. Sometimes the King himself did express the words, design the place, appoint the number, and name all in the charter, so that it is a Compleat Corporation, and nothing is left for the Founder or Donor, but to make an Endowment of Lands. And sometimes the King by his Charter reserves as well the nomination of the persons, as the name of the Incorporation to the Founder. And that when he hath declared it in writing, according to his authority, then they are Incorporate by the Letters Patent of the King, as if it had all been put into the Letters Patent."

The next section, VII, is entitled, "The Charter for Corporations divided into parts and opened." Among things "declaratory or explanatory, and inserted only in point of discretion, and for conveniency" he mentions, p. 41:

"So the Clauses, to buy and sell, sue and be sued, have and use a common Seal, to restrain alienation or demise of the land belonging to the Corporation. That the Survivors shall be Incorporate. That if the revenues increase, they shall be employed to the publique use of the Corporation. To be visited by the Governours. To make Ordinances, That the Ordinary shall not visite it, License to purchase in Mortmain, and some general Clauses and Provisoes. The Corporation is well made without all this."

Among the things not "at all incident to Corporations, but Commonly granted to them when they are erected," he mentions, p. 42:

"Felon's goods, and of fugitives, and persons out-lawed in Civil Actions, The Forfeitures by Penal Statutes, Recognizances, Hundreds, Courts and Conuasance of Pleas, Fairs, Markets, Wayfs, Estrayes, Treasure Trove, Deodands, Exemptions from serving in Offices, Juries, payment of Toll, Picage, etc. The Assise of Bread and Beer, Pillory and Tumbrell, The Office of the Justice of Peace, Coroner, Clerk of the Market, and a great part of the Sheriff's Office and the like."

On p. 43 he says:

"3. There are some things often inserted in these Charters that are unlawful; as, to make Ordinances to

> imprison men; or to forfeit goods upon disobedience; or to restrain the liberty of Trade, and such clauses as restrain the Corporation having of that which is incident to it, and the like."

Sheppard fails to point out here or elsewhere the difference in this respect between a charter granted by the King and one granted by Parliament. The Courts may declare certain provisions of the charter of the King to be unlawful, but they have no such power if the charter be one granted by Parliament. If such a charter should contain a provision that all actions against the corporation should be tried and determined by its directors sitting as a court and without a jury, under the English constitution where is there any power to declare such a provision unlawful?[1]

It follows therefore that a charter granted by Parliament is more valuable than one granted by the King. The theory being that only the King can incorporate and that when Parliament incorporates it does so as the representative or agent of the King, the charter of the agent being of superior efficacy to that of the King, it follows that the agent, the inferior, is superior to the superior in this respect. Such is one of the results of the theory that only the King can incorporate.

On p. 44, Sheppard writes an important principle. "1. That all these Charters have the most favorable interpretation in Law that can be. And they shall be taken strongly against the Lo. Pr. and to advance the work intended by it."

This salutary principle is ignored in the numerous American cases, holding, generally, however, only by way of *dictum,* that municipalities are purely creatures of the legislature and are subject to their will.[2]

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[1] But see the statement by Holt, C. J. in City of London vs. Wood, 12 Mod. 669: "What my Lord Coke says in Bonham's Case in his 8 Co. ("For when an act of parliament is against common right and reason, and repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void," 8 Co. 118a) is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament——. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B.; but it may make the wife of A. to be the wife of B. and dissolve her marriage with A." See further the note and authorities cited in the editions of Coke's Reports by J. H. Thomas & J. Q. Fraser, London, 1826, vol. 4—pp. 375 and 376.

[2] See the authorities cited in "The Origin of Municipal Incorporation" and in the series of articles on "The Right to Local Self Government," by Amasa M. Eaton in the Harvard Law Review, 1900.

After advising his readers to "follow the draught now generally used in the making of these Charters" Sheppard proceeds, p. 45, to consider the several parts of a charter, with general forms for a town charter, p. 46, and for a hospital charter, p. 48. Then follows some repetition as to unnecessary powers, as, p. 52, to sue or be sued, p. 53, to hold in mortmain, but see p. 54, "Onely this, for Land of Inheritance if the Corporation purchase of this without license of the Lo. Pro. it is in danger to lose the land upon the Statute of Mortmain," which means probably that as to lands embraced by the charter, the charter itself is authority to the corporation to hold them forever, notwithstanding the statutes of mortmain; but it requires the license of the King to take title to land afterwards.

So, p. 55, the usual clause giving power to use a common seal is unnecessary.

> P. 56: "It is usual in these Charters by way of grant or Direction from the King, to set down all the forms of Government, the numbers and names of their Chief, and other Officers, whereof their Common Council shall be made up, and what Officers and Members there shall be, how chosen, sworn, continued, and removed, to this purpose: That there shall be a Mayor, Recorder, 6 Aldermen and Common-Council. That 20 be chosen out of the inhabitants for the Common-Council. That out of these the Mayor and Aldermen shall be chosen. That 12 of these 20 (whereof the Mayor, Recorder, or four of the Aldermen, or any two of them, to be two), shall make a Common-Council to make orders, etc. How and when they shall meet. To appoint what Officers shall be in the whole Corporation: To say, that there shall be besides the Mayor, Aldermen, Recorder, Justices of the Peace, a Custos Rotu-
> ..lorum, a Town Clerk, Clerk of the Market, and Coroner, Clerk of the Peace, two Chamberlains, a Sword-bearer, two Sergeants at the Mace, one Bayliff, a Clerk of the Statutes, two High Constables, etc. To appoint how officers and members shall be from time to time Elect. To name the present Mayor, Aldermen, Recorder, Councilmen, and Officers. To set down what shall be done to them that refuse the office or place being chosen; How they shall be sworn, continue in their place, or be removed upon death or misdemeanor, and others put in. And so otherwise as the Government is constituted.

> "1. All this we look upon as not necessary to be inserted in the charter, for they are not of the essence, for they may govern themselves without this; or, haply, they may do it in another manner than is set down; but it is providently done, and the best way to insert and express it in such a manner and such words as is usual, let them be of what force they will in law."

This extract, given in full, shows that, dropping out of sight for the time being all other kinds of corporations, Sheppard was now writing particularly of municipal corporations, the kind with which we might suppose him to be most familiar, remembering [1] that in 1656 he was made one of four clerks appointed to draw up charters granted by Cromwell to town corporations. Note also that he says, not only that municipal corporations may do all these things without express powers conferred in their charters, but further, even if so set down in their charters, they may exercise such powers in a different way from that set down. This is good proof from contemporaneous authority, a man with knowledge of law and an officer of the law for the issuance of these charters, that at that time the municipal corporations of England enjoyed a measure of local authority that would be denied to them by the courts of this country, holding that they have no powers except such as are conferred upon them by the legislature. For here we find that in the face of express authority to do these specified things in specified ways, they may do them in other ways that are not specified. That is to say, Sheppard considered such provisions not to be mandatory, and he held that in spite of them a town may regulate its own government by other officers than those provided in the charter. *A fortiori,* neither parliament nor King should have a right to interfere in the management of the town's local affairs under its own by-laws. Under the democratic system of the United States, this salutary principle should certainly be recognized.[2]

P. 58: "2. Albeit it be expressed in the Charter, that the choyce of their Mayor, Bayliffs, or other principal officers, shall be by the Cominalty, yet, if by a long usage they have chosen them by a select number of the principal of the Cominalty, or of the Burgesses, although no such constitution can be shewed to warrant such elec-

[1] p. 259 ante.

[2] This is not a denial of the right of the legislature to pass any general laws that may be necessary.

tion, yet this Election is good Law, being intended and presumed to begin by common consent. Coo. 4. 77."

This is most remarkable! It shows that charters were considered of very little account—of which we have other evidence, witness the constant renewal and confirmation of charters upon the accession of a new lord of the manor or of a new king.

It also shows utter disregard of the rule, now accepted, that parol testimony shall not be allowed to vary the terms of a written document.

Such a doctrine led inevitably to close incorporation and all its evils. In this country we have fortunately escaped them, through our acceptance of the principles of democracy. We inaugurated a system of town government without the evil results following from the dominion of a lord of the manor, or of a King. We are creating new evils, however, by substituting the absolute power of the legislature over towns and ignoring all limits to that power.

After discussing the provision for Justices of the Peace in the town charter and whether they shall consist of the Mayor, Aldermen or Ancient Aldermen, etc., or shall be chosen by the corporation every year, Sheppard concludes, p. 61: "For we cannot approve the Election of Justices by the Corporation." In New England this right has been jealously guarded. In Rhode Island so highly is it valued, it is expressly reserved in the Constitution, Art. X, sec. 7:

> "The towns of New Shoreham and Jamestown may continue to elect their wardens as heretofore. The other towns and the City of Providence may elect such number of justices of the peace, resident therein, as they may deem proper. The jurisdiction of said justices and wardens shall be regulated by law. The justices shall be commissioned by the Governor."

When Sheppard wrote, had be but known it, he had but to look across the ocean to find the election of justices of the peace by the self-instituted corporations here established, rather than by a select body out of their own number, to be working successfully. But what Englishman of that century would have thought of looking here for political guidance!

So, p. 70, he thinks it is not so safe to make the Coroner and Clerk of the Market eligible by the Corporation, but rather to make the head-officer to be these, in the charter itself. Evidently our writer had not faith in Democracy.

P. 61, Sheppard says:

> "It is usual to insert a clause to prohibit the Justices of the Peace of the County, to intermeddle there in anything concerning the office. So for the Sheriff, Clerk of the Market, and Coroner's office. And this is useful and sufficient to keep them out from intermeddling there."

This recognizes, impliedly, the right to local self-government. Had this suggestion been followed in the municipal charters afterwards issued, even this slight admission of the right to local self-government might have contributed towards prevention of the oblivion of this right that now obtains.

(*To be continued in our April issue.*)